

**TRIAGING COMMON
EMPLOYMENT LAW PROBLEMS:
SPOTTING ISSUES, GIVING ADVICE, AND
KNOWING WHEN TO CALL FOR HELP**

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“I want to terminate an employee and thought I should check with a lawyer first.”



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EMPLOYMENT IS AT WILL . . .



EXCEPT WHEN IT'S NOT

- Public policy
- Implied contract
- Covenant of good faith
- Illegal Reason (discrimination, retaliation)



PUBLIC POLICY

Examples:

- Refusal to do something illegal
- Applying for work comp benefits
- Reporting fellow employee to law enforcement for suspected criminal activity and cooperating.

IMPLIED CONTRACT

Enforceable expectation based on a statement or employment handbook that employment can only be terminated for just cause or that specific steps have to be taken before termination.

COVENANT OF GOOD FAITH

Implied into contracts to prevent termination in the absence of just cause.

ILLEGAL DISCRIMINATION

Treating a person differently based partially or entirely on a characteristic or trait that the law protects.



PROTECTED CLASSES

Race/National Origin/Ethnicity/Color/Ancestry	Sexual Orientation
Religion/Creed	Gender Identity
Sex/Pregnancy/Child Birth	Local Human Rights Commission Participation
Marital Status/Familial Status	Military Service
Disability/Medical Conditions/HIV/AIDS	Arrest/Conviction Record
Genetics	Citizenship
Age	Medical conditions
Public Assistance	Political Affiliations

ILLEGAL RETALIATION/REPRISAL

Taking adverse action against someone because they did or said something that the law protects.

PROTECTED COMPLAINTS/REFUSALS/ACTIONS

- Legal compliance
- Safety issues
- Discrimination
- Quarantine/isolation
- Harassment/hostile environment
- Refusal to do something the employee believes is illegal or unsafe
- First Amendment protected speech

BE CURIOUS AND FOLLOW UP





EMPLOYEE'S JOB AND PERFORMANCE HISTORY





WHAT HAPPENED?





CONTRACTS?

- Offer letter
- Employment Agreement
- Collective Bargaining Agreement
- Handbook



POLICIES





HOW HAVE OTHER EMPLOYEES WITH SIMILAR ISSUES BEEN ADDRESSED



SUPERVISOR/DECISION MAKER



DOCUMENTS

- Contracts, offer letters, bargaining agreement
- Handbook/policies
- Personnel file
- Any other documents relevant to the issue leading to termination (e.g., time clock or compensation records, security video, emails/texts/communications with or about the employee).

PUBLIC POLICY, IMPLIED CONTRACT, COVENANT OF GOOD FAITH



DISCRIMINATION ANALYSIS

DIRECT EVIDENCE



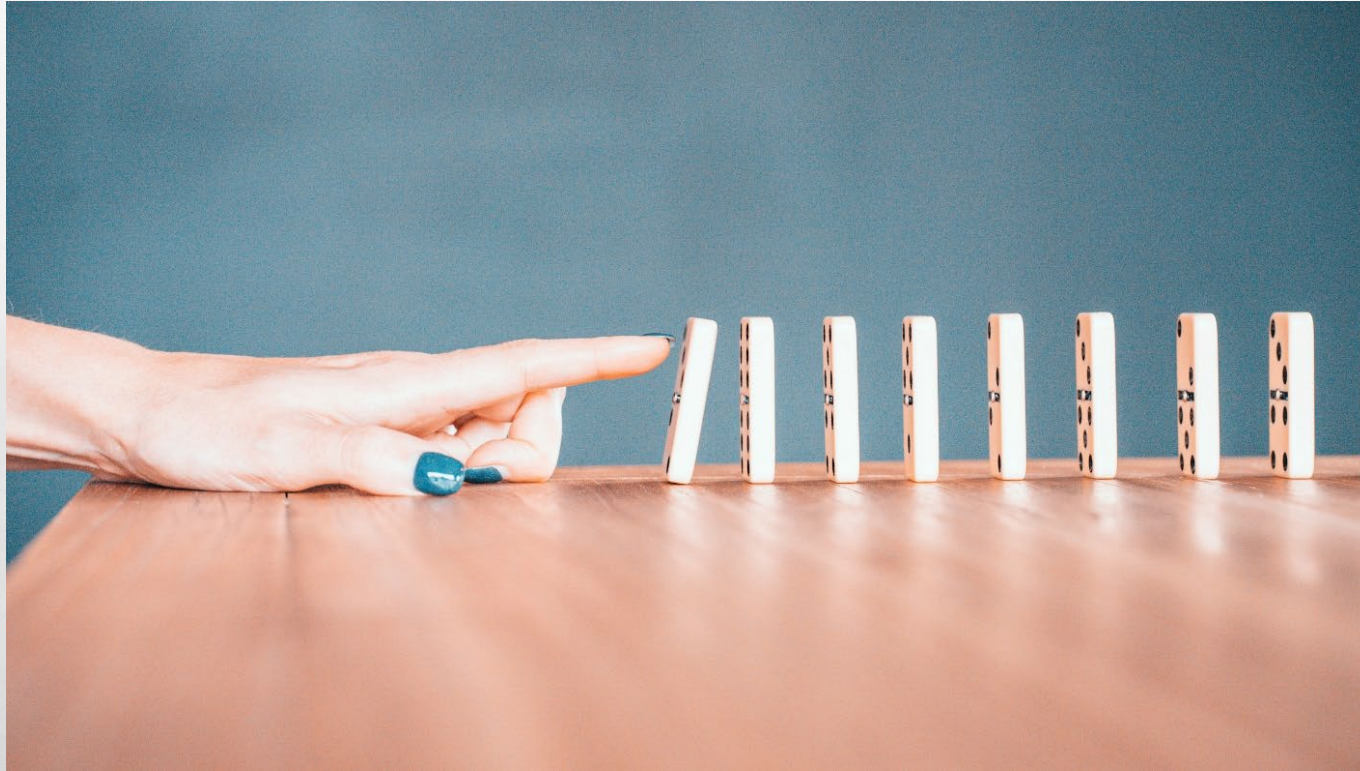
DISCRIMINATION ANALYSIS

CIRCUMSTANTIAL EVIDENCE: PRIMA FACIE CASE

- Protected Class
- Adverse Action
- Connection

DISCRIMINATION ANALYSIS

CIRCUMSTANTIAL EVIDENCE: LEGITIMATE REASON



DISCRIMINATION ANALYSIS

CIRCUMSTANTIAL EVIDENCE: PRETEXT





ISSUE SPOTTING FOR OTHER SCENARIOS

- Defamation
- Retaliation
- Promissory Estoppel
- National Labor Relations Act, Section 7
- Religious organization



“I have an employee who says she is ill/injured and can’t come to work for an indefinite time. What can we do?”

EMPLOYEE'S JOB AND PERFORMANCE HISTORY



DID THE INJURY OCCUR AT WORK?



WHAT DO YOU KNOW ABOUT THE ILLNESS/INJURY?



HOW MANY EMPLOYEES DO YOU HAVE?

How many employees within 75 miles of this employee's location?

DOCUMENTS

- Any policies regarding leaves the employer provides, including paid time off, sick leave, notice of absence, and other leave policies.
- The employer's Family Medical Leave Act ("FMLA") and any related policy.
- First report of injury
- Any notes from health care providers
- Any communications describing the issue
- Any historical medical records about this medical issue.

INFORMATION TO REQUEST FROM EMPLOYEE AND HIS/HER PROVIDER

A covered employer “shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature and severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.”
42 U.S.C. § 12112(d)(4)(A).

You may ask about the employee’s ability to perform the essential functions of the employee’s job.

LEAVES

- Employer-provided paid or unpaid leave
- FMLA
- ADA
- State and local laws/ordinances

ACCOMMODATIONS

- Learn more – from employee and health care providers
- Discuss with the employee things that might help: schedule changes, intermittent leave, less time on the employee's feet, extra breaks for snacks and insulin readings?
- Would the accommodations the employee requests be burdensome?
 - How expensive would they be?
 - How would they impact employees, customers, and others?

DOCUMENT



QUESTIONS?

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